LIKAS REALITY SDN. BHD.

v.

BUMIBARU (M) SDN. BHD. & ORS.

HIGH COURT BORNEO, KOTA KINABALU
SYED AHMAD IDID JC
[CIVIL APPEAL NO. 4 OF 1989]
21 MAY 1991

CONTRACT: *Agreement for sale and development of plot of land - Failure to pay balance of purchase price - Issue of illegality - Access roads said to be in contravention of Town and Country Planning Ordinance - Effect of - Occupation certificate issued by relevant authority - Town & Country Planning Ordinance, s. 15(5), Chapter 141.*

CIVIL PROCEDURE: *Application for final judgment - Triable issues - Subordinate Court Rules, O. 26A r. 2.*

The appellants (L) entered into an agreement for sale of a lot at the Likas Industrial Centre with the 1st respondent purchaser (R1) on 21 June 1983. A supplementary agreement dated 15 November 1984 was entered into between L, R1 and the 2nd, 3rd & 4th respondents (R2, R3 and R4) who were guarantors. The respondents requested L to extend time of payment and to re-schedule the payment of the remaining balance of the purchase price of RM112,500.

On 2 October 1987, L instructed their solicitors to proceed with the necessary Court actions against R1 on the remaining outstanding balance of RM78,307.88. The solicitors proceeded to do so and on 14 July 1988 applied under O. 26A r. 2 of the Subordinate Court Rules 1980 for an order to enter final judgment against all respondents.

The defence raised the issue of illegality in that the access roads constructed on the lot contravened the Town and Country Planning Ordinance (Cap 141) and that they were not in accordance with the principal agreement between the parties. The Sessions Court struck out the application as it was decided that there were triable issues of illegality.

L appealed against this decision.

Held:

[1] Upon obtaining the occupation certificate, L had performed their part of the obligations under the agreement.

[2] In this case the respondents were well aware of what they had signed but attempted to delay payment behind the skirt of Court action. There cannot be a finding of illegality just because L did not construct an access road or two. That cannot be the expectation of persons in business transactions particularly when these roads were not included in the documentation. The respondents knew their part of the bargain and must accept their fate.

[3] The evidence on the whole cannot sustain the respondents counterclaim for rescission, return of monies paid, damages and costs.

[Appeal allowed with costs.]

Cases referred to:
Anderson Ltd. v. Daniel [1924] KBD 138 ***(cit)***
B.Trak Sdn. Bhd. v. Bingkul Timber Agencies Sdn. Bhd. & Anor. [1989] 1 MLJ 124 ***(cit)***
Gissco Sdn. Bhd. v. Blackgold (M) Sdn. Bhd. [1988] 2 MLJ 397 ***(cit)***
Permodalan Plantations Sdn. Bhd. v. Rachuta Sdn. Bhd. [1985] CLJ (Rep) 242 ***(cit)***
Tan Chong & Sons Motor Co. (Sdn) Bhd. v. Alan Mcknight [1983] CLJ (Rep) 394 ***(cit)***

Legislation referred to:
Subordinate Courts Rules 1980, O. 26A r. 2
Town and Country Planning Ordinance (Cap 141), s. 15(5)

For the appellants - Peggy Liow; M/s. Jayasuriya Kah & Co.
For the respondents - Cecilia Hwang; M/s. Vincent Wong & Co.

JUDGMENT

Syed Ahmad Idid JC:

The appellants filed their notice of appeal on 12 September 1988 as they were "dissatisfied with the decision of the Sessions Court at Kota Kinabalu given on 30 August 1988 whereby it was ordered that the defence filed therein was not a sham and that there was a triable issue of illegality". The Sessions Court had struck out the appellants' notice of application under O. 26A r. 2 of the Subordinate Courts Rules 1980 for summary judgment. In addition, the Sessions Court awarded costs of RM100 to 1st, 2nd, 3rd and 4th defendants.

Actions in Court:

13 November 1987 Summons No. SC .K. 187 of 1987 was applied for. By 2 October 1987, Likas Reality (the appellants) wrote to their solicitors M/s. Jayasuriya Kah & Co., instructing the firm to proceed with the necessary Court actions against 1st respondent on the outstanding balance of RM78,307.88. The firm then wrote to 1st respondent on 5 October 1987 and to the 2nd, 3rd and 4th respondents on 30 October 1987.

13 February 1988 Defence of 1st defendant entered.

3 March 1988 Plaintiffs entered defence to counterclaim.

18 March 1988 Defence of 2nd, 3rd and 4th defendants entered.

14 July 1988 Plaintiffs applied under O. 26A R. 2 for an order to enter final judgment against 1st, 2nd, 3rd and 4th defendants for the sum of RM75,975.41. The application was supported by the affidavit of Peggy Liow dated 14 April 1988.

23 August 1988 Felix Poh (2nd defendant) swore an affidavit praying that the plaintiffs' application be dismissed. He exhibited the (i) Agreement for Sale (AS) dated 21 June 1983 between appellants and 1st respondent (pp. 35 to 46 of the Appeal Records); (ii) Joint Development Agreement (JDA) dated 8 April 1985 between appellants and Visa Sdn. Bhd. (a party separate from the appellants and any of the respondents here) pp. 49 and 50.

23 August 1989 Jie Sing Yin, the managing director of the appellant (who has since died) swore an affidavit, believing that there was no defence to plaintiffs'/appellants' action. He exhibited a supplementary agreement (SA) dated 15 November 1984 on which stamp duty of RM562 had been paid. This referred to the "AS" dated 21 June 1983. The "SA" was between 1st respondent (purchaser), the appellants (the developer) and the 2nd, 3rd and 4th respondents (as guarantors). The purchaser (1st) and the guarantors (2nd, 3rd and 4th respondents) requested the developer (appellants) to extend time of payment and to re-schedule the payment of the remaining balance of the purchase price of RM112,500 (pp. 58 to 66 of the appeal records).

At the Sessions Court the defence (respondents here) relied on six issues: (1) The contract is illegal as performed; (2) Breach of condition; (3) Implied term; (4) Oral agreement; (5) Collateral agreement; (6) Misrepresentation.

The judgment of Mr. Raymond Wong states at pp. 20 and 21:

> 20. In the case of *Burns v. Kondel* [1971] Lloyd's Law Reports 554, it was held by the Court of Appeal that a defence on the merits does not mean a defendant must show a good defence but need only show one which discloses an arguable or triable issue.
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> 21. The defence had raised the issue of illegality and that the access roads were in contravention of the Town and Country Planning Ordinance Chapter 141 and were not in accordance of the principal agreement and as such, the defence was not a sham and there is triable issue in this suit and it is not a fit case for summary judgment. The plaintiffs application is struck out with costs of RM100.

At the hearing of the appeal on 10 May 1991. Miss Cecilia Hwang, learned Counsel for the respondents, stated that:

> we are not saying the agreements were illegal. We say the performance was illegal so plaintiffs cannot sue under the two agreements.

To that Miss Peggy Liow, learned Counsel for the appellant, counterstated that:

> the performance was substantially completed and the Kota Kinabalu Municipal Council's (KKMC) occupation certificate (OC) was issued on 6 December 1985.

The respondents (or defendants) claim that the Sessions Court Judge was right in deciding that the issue of illegality (regarding the access roads) was arguable and triable. But what exactly is this item said to have turned the perfectly efficacious agreements into something whereby their performance was illegal? In support of this contention, the respondents quoted:

(1) *Anderson Ltd. v. Daniel* [1924] KBD 138.

(2) *B.Trak Sdn. Bhd. v. Bingkul Timber Agencies Sdn. Bhd. & Anor.* [1989] 1 MLJ 124 where the High Court held that there was a triable issue of whether the relevant agreements were leasing or hire-purchase agreements. (It must be noted that in the instant case, there is no need to differentiate as the agreements both dated 21 June 1983 and 15 November 1984 are valid and subsisting.)

(3) *Tan Chong & Sons Motor Co. Sdn. Bhd. v. Alan McKnight* [1983] CLJ (Rep) 394.

(4) *Permodalan Plantations Sdn. Bhd. v. Rachuta Sdn. Bhd.* [1985] CLJ (Rep) 242.

(5) *Gissco Sdn. Bhd. v. Blackgold (M) Sdn. Bhd.* [1988] 2 MLJ 397.

The facts which determine the outcome of this appeal include:

21 June 1983 Agreement for sale of Lot 32, Likas Industrial Centre between plaintiffs (appellant here) and 1st defendants (or 1st respondent here) (principal agreement or "SA").

15 November 1984 Agreement between plaintiffs and 1st, 2nd, 3rd and 4th defendants for extension of time for payment by the 1st, 2nd, 3rd and 4th defendant of balance of purchase price to plaintiffs (supplemental agreement or "SA").

8 April 1985 Joint Development Agreement ("JDA") between plaintiffs and a third party, Visa Sdn. Bhd. to jointly develop roads including access roads.

6 December 1985 Occupation certificate in respect of Likas Industrial Centre including Lot 32 issued by the authority concerned.

The occupation certificate ref: MPKK NO. S/327 dated 6 December 1985 stated that:

> the building recently erected by you (that is the plaintiffs/appellants) has been inspected and found to have been completed in accordance with the approved plan. You are hereby authorised to occupy the said premises.

The building in dispute is among the 16 units of 4-storey shophouse/offices and 27 units of 2-storey warehouse/offices, the plans and specifications to which had been approved (according to the "AS" dated 21 June 1982 between appellant and the respondents) by the Majlis Perbandaran Kota Kinabalu *vide* its letter of approval ref: S/327/40 dated 19 October 1981 and are within the CL. 30661, 30662 and 30663 mentioned in the "OC". What more could the plaintiffs/appellants be expected to do?

Miss Peggy Liow said at the appeal that the learned Sessions Court Judge:

> clearly dismissed plaintiffs application for summary judgment based on the finding of the issue of illegality ... I can see at para. 20(a) of the 21 June 1982 agreement that the developer (that is the plaintiffs/appellants here) undertake to construct the roads, road-side drains, sidewalks and to lay the water mains and electricity mains in accordance with the approved plans.

Conclusion

While I agree with the respondents that the access roads (that is the additional ones into Jalan Tuaran) were important, it was unfortunately not included in the plans approved by the Majlis Perbandaran Kota Kinabalu. Nor in the "AS" or the "SA".

The plaintiffs/appellants, upon their obtaining the occupation certificate, had performed their part. See p. 39 of the appeal record at para. 8 of the "AS" 21 June 1983 where the developer (that is the appellants) undertook to obtain from the local authority the "occupation permit" (which the Majlis Perbandaran Kota Kinabalu terms as occupation certificate). So there is no triable issue.

At p. 55 of the appeal record, the late, Mr. Jie Sing Yin, averred that the 1st respondents were raising the access road as a matter to delay payment of the balance of the purchase price and interest to the appellants. This appears the better view of the situation existing.

Finally, Miss Hwang raised s. 15(5) of the Town and Country Planning Ordinance which states:

> Every person who, otherwise than in accordance with an approved scheme or by permission granted under the provisions of para. (a) of subsection (2), proceeds with or does any work in contravention of this section shall be guilty of an offence, and shall be liable on conviction to a penalty of one thousand dollars together with in the case of a continuing offence, a further penalty of one hundred dollars for every day during which the offence is continued

in a tone which suggested that the appellants should or could have been fined under that law. But Miss Liow firmly resisted that suggestion and instead stated that plaintiffs (or appellants) have not been charged under s. 15(5). Merely as an aside, it was improper for respondents' Counsel to raise such an issue when there was no evidence to back it.

I can well understand the dilemma that the learned Sessions Court Judge was in ... to offer every opportunity to all litigants to go to trial. But legal process must be jealously guarded to ensure that persons who are liable under the agreements they freely sign must be accountable for their deeds. This is a case in point where the respondents knew what they signed but attempted to delay payment behind the skirt of Court action. There cannot be any finding of illegality just because the appellants did not construct an access road or two. That cannot be the expectation of persons in business transactions particularly when these roads were not included in the documentation. The respondents knew their part of the bargain and they must accept their fate, though delayed.

The evidence, on the whole, both at the appeal and from the appeal records, cannot sustain the respondents counterclaim for:

(1) rescission;

(2) return of monies paid;

(3) damages and interests;

(4) costs and

(5) such other relief;

and accordingly the counterclaim is dismissed.

The Court allows the appeal and now orders the respondents to satisfy the appellants claims in:

(1) the sum of RM75,975.41;

(2) agreed interest on the principal balance of RM69,270.60 from 16 September 1987 until actual payment; and

(3) costs:

(a) Court fees;

(b) solicitors fees.

in this Court and the Court below.

Also found at [1991] 3 CLJ 2881